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No. 78-920

In the Supreme Court of the United States

OCTOBER TERM, 1978

GENERAL CRUDE OIL COMPANY, PETITIONER

v.

DEPARTMENT OF ENERGY, ~~ET AL~~ ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-19) is reported at 585 F.2d 508. The opinion of the district court (Pet. App. A-20 to A-24) is not reported. The Remedial Order issued by the Federal Energy Administration (Pet. App. A-51 to A-71) is not reported, and the Decision and Order on appeal (Pet. App. A-26 to A-50) is reported at 4 FEA ¶ 80,552, CCH Energy Management, 1976 Decisions.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1978. A petition for rehearing was denied on November 9, 1978 (Pet. App. A-72). The petition for a writ of certiorari was filed on December 9, 1978. The jurisdiction of this Court is invoked under 15 U.S.C. 754(a)(1), incorporating 12 U.S.C. 1904 note.

QUESTION PRESENTED

Whether the Federal Energy Administration properly determined that petitioner is a producer of crude oil rather than a refiner of residual fuel oil within the meaning of federal regulations.

STATEMENT

Petitioner uses a recovery technique known as *in situ* combustion to extract crude oil from underground reservoirs. It then blends the oil with other oil and removes the water in an above-ground facility. Petitioner designated its end product as "residual fuel oil" and priced it under the petroleum price control regulations applicable to refiners. 10 C.F.R. 212, Subpart E.

Pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, the Federal Energy Administration issued a remedial order to petitioner.[1]

[1] On October 1, 1977, the Department of Energy assumed FEA's functions pursuant to 42 U.S.C. 7151(a) and Executive Order No. 12009, 42 Fed. Reg. 46267 (1977).

The FEA concluded that petitioner's oil should have been priced under the regulations applicable to producers (10 C.F.R. 212, Subpart D) rather than those applicable to refiners (Subpart E). It ordered restitution of overcharges and the prospective reduction of prices (Pet. App. A-51 to A-71). The order was upheld on administrative appeal (Pet. App. A-26 to A-50).

Petitioner then brought this action, contending that FEA's order was invalid. The district court held that petitioner had properly priced its product under the "refiner" rules. This holding was based chiefly on the court's conclusion that petitioner "substantially" changes the product within the meaning of the regulation that defines a refiner as one who "blends and substantially changes covered products" (Pet. App. A-22).

The court of appeals reversed, holding the FEA's determination that petitioner was a producer rather than a refiner is supported by substantial evidence and that FEA's application of its own regulation to petitioner is an interpretation entitled to judicial deference (Pet. App. A-12 to A-17).

ARGUMENT

This case concerns only the construction of a regulation. It involves no legal question of general importance. Moreover, because the FEA's interpretation of its own regulation "is not plainly inconsistent with the wording of the regulation," the court of appeals properly "accept[ed] the Government's reading of

those regulations as correct." *United States* v. *Larionoff*, 431 U.S. 864, 873 (1977). There is therefore no reason to grant review.

1. Petitioner's product satisfies the regulatory definitions of both crude oil and residual fuel oil (Pet. 4-5). Petitioner itself meets the definition of a "producer" (Pet. 4). Petitioner contends that it also meets the definition of a "refiner" (Pet. 5) and therefore is entitled to the more favorable pricing rules available to refiners. The regulation states that a "refiner" is "a firm * * * which refines covered products or blends and substantially changes covered products * * *." 10 C.F.R. 212.31. Petitioner contends that a substantial change in its product occurs between the time it is in the ground and the time it leaves petitioner's blending machine.

FEA concluded, however, that petitioner's activities were those of a producer rather than a refiner. The underground change in the crude oil is merely incidental to the removal process. The above ground blending and treating of the oil does not constitute refining, as it is traditionally understood, nor does it substantially change the substance. Since 1958 petitioner has used the underground combustion process as a means of removing the oil from the ground.[2] Until December 1973 petitioner regarded its product

[2] Congress has recognized in situ combustion as a "tertiary enhanced recovery technique" for removal of oil from the ground. See Section 122 of the Energy Conservation and Production Act, 15 U.S.C. 757. The petroleum industry also recognizes in situ combustion as a method of production (Pet. App. 7).

as crude oil (Pet. App. A-8). In December 1973 petitioner installed certain above-ground treating and blending facilities at a cost of approximately $10,000 (*ibid.*). This device blended and treated the crude oil in a rudimentary way that did not involve the complexity and sophistication usually associated with a refining process (*ibid.*). The court of appeals properly held that petitioner's activities are those of a producer, not a refiner, and that the changes caused by the blending were not substantial enough to require FEA to treat petitioner as a refiner. Petitioner contends that this analysis disregards the physical change caused by in situ combustion by dismissing it as incidental to the removal process, but nothing in the regulation requires that changes in the oil caused solely by the nature of the removal process be considered as the work of a "refiner."

Petitioner also contends that in the district court government counsel stipulated that petitioner's product is materially and substantially different from crude oil in its natural state (Pet. 10-11). But counsel made no such stipulation. During oral argument in the district court, petitioner's counsel, in the middle of a lengthy argument, read a statement with which, he asserted, government counsel agreed. He went on to other matters. At no time, however, did the court ask whether government counsel agreed, and at no time did government counsel state agreement with the asserted stipulation.[3]

[3] See Dec. 13, 1977, Tr. 47-48 and passim.

2. Petitioner argues (Pet. 21-25) that the court of appeals' decision conflicts with prior administrative decisions and ignores the goals of federal energy legislation. Petitioner does not explain why the administrative decisions it cites (Pet. 23) are controlling or even bear on the immediate problem. None is apposite. For example, petitioner characterizes *Tristate Oil and Asphalt Sales, Inc.*, Interp. No. 78-22 (June 9, 1978), CCH Enforcement Manual ¶ 56,413, as "flatly irreconcilable" with the present case. That decision, however, confirms rather than contradicts FEA's decision in this case. *Tristate* ruled that mere blending, which is essentially what petitioner does, does not constitute refining. Moreover, the agency ruled that Tristate was a refiner because it transformed petroleum into asphalt and residual fuel oil through a complicated procedure of steam circulation, settling tanks, high speed mixers, and blending. This resulted in a substantial change in the material.[4]

As for the national goals of energy regulation, the court of appeals properly held that FEA's order served the statutory goal of "equitable distribution of crude oil, residual fuel oil, and refined petroleum products" (Pet. App. A-10) and, of course, it advanced the congressional goal of controlling producer prices.

3. Petitioner contends that it was entitled to an evidentiary hearing before FEA ordered it to refund

[4] Moreover, *Tristate* did not present a question of the choice between the "producer" and "refiner" rules but rather a choice between the "refiner" and the "reseller" rules.

substantial sums and to alter its pricing. Although formal evidentiary hearings have been required for enforcement proceedings commenced after October 1, 1977,[5] there was no statutory requirement for formal hearings when the proceedings in question were held. See Section 207 of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, incorporated by reference in the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1).

Nonetheless, at the time of the proceedings in this case, petitioner was entitled by regulation to be heard and to present evidence at several points in the administrative decision process.[6] In fact, petitioner made voluminous submissions and participated in three conferences before the final decision was made (R. 249, 265-282, 300, 310-338, 379-467, 483-486, 518-524 and 526-535).[7] At least where, as here,

[5] See Section 503 of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 590, 42 U.S.C. 7193.

[6] Pursuant to FEA's procedural regulations, administrative proceedings are commenced by the filing of a Notice of Probable Violation ("NOPV"). The person receiving the NOPV may reply in writing, and may request a conference regarding the notice. 10 C.F.R. 205.191 (1976). If after considering all submissions FEA finds that a violation of the regulations has occurred, it may issue a remedial order. 10 C.F.R. 205.192 (1976). A written appeal from a remedial order may be filed with FEA's Office of Exceptions and Appeals, 10 C.F.R. 205.108 (1976), and a conference or hearing may be requested. A hearing is held at FEA's discretion "when it appears that such hearing will materially advance the proceedings." 10 C.F.R. 205.172(b) (1976).

[7] "R." refers to the record in the court of appeals.

there were no disputed factual issues that might turn on questions of witness reliability,[8] this procedure satisfied the demands of due process. See generally *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Richardson* v. *Perales*, 402 U.S. 389 (1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioner contends (Pet. 26) that a formal evidentiary hearing was required to determine the chemical differences between the reservoir oil and the final product. Any such determination, however, would not have affected the outcome. As mentioned above, the agency was entitled to interpret its own "refiner" definition to consider only above-ground changes and to exclude changes incidental to the removal. It is quite evident that the above-ground changes in petitioner's oil are not substantial. At all events, questions of chemistry could be resolved on written submissions with an adequate degree of accuracy.

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